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**Subject:** Navy Redline of ETCA  
**Attachments:** HPNS ETCA Navy Redline 11-02-10.doc  
  
**Categories:** Hunters Point

Tiffany:  
Attached is the Navy Redline of the ETCA for discussion next week. Please call if you have any questions.  
R/  
Doug

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**11-02-2010 Navy Redline**  
**SFRA 10/7/2010 COMMENTS TO NAVY 25 JUNE 2010 VERSION**

**EARLY TRANSFER COOPERATIVE AGREEMENT**  
**COVERING PORTIONS OF**  
**HUNTERS POINT NAVAL SHIPYARD**  
**BETWEEN**  
**THE UNITED STATES OF AMERICA**  
**DEPARTMENT OF THE NAVY**  
**AND**  
**THE SAN FRANCISCO REDEVELOPMENT AGENCY**  
**SAN FRANCISCO, CALIFORNIA**

**HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE  
AGREEMENT**

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HUNTERS POINT NAVAL SHIPYARD  
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THE SAN FRANCISCO REDEVELOPMENT AGENCY,  
SAN FRANCISCO, CALIFORNIA  
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# HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

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Appendix 9	Technical Specifications and Requirement Statement (“TSRS”)
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Appendix 11	Federal Facilities Agreement, as amended
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Appendix 13	<i>Agreement to Implement the March 31, 2004 Conveyance Agreement between the United States of America and the San Francisco Redevelopment Agency for the conveyance of Hunters Point Naval Shipyard with Regard to IR Sites 7/18 and the Radiologically-impacted Area around Building 140 dated _____. Delete App 13. Legally enforceable agreement and escrow instructions to insure that Agency has obligation to accept title when conditions for transfer are met. These conditions include RACR, FOST acceptable to DTSC, EPA, and RWQB. Draft of escrow instructions to be provided. FFA provisions with respect to IR 7/18 need to be drafted. IR 7/18 will be excluded from the AOC terms? What requirements will be imposed by EPA with respect to this parcel?</i>

**HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE  
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COVERING PORTIONS OF  
HUNTERS POINT NAVAL SHIPYARD  
BETWEEN  
THE UNITED STATES OF AMERICA  
DEPARTMENT OF THE NAVY  
A N D  
THE SAN FRANCISCO REDEVELOPMENT AGENCY,  
SAN FRANCISCO, CALIFORNIA**

1       **THIS EARLY TRANSFER COOPERATIVE AGREEMENT** ("Agreement") is  
2 made by and between the **UNITED STATES OF AMERICA**, acting by and through Naval  
3 Facilities Engineering Command ("Navy") and the **SAN FRANCISCO REDEVELOPMENT**  
4 **AGENCY**, San Francisco, California ("SFRA") recognized as the local redevelopment  
5 authority by the Office of Economic Adjustment ("OEA") on behalf of the Secretary of  
6 Defense and also a local public authority legally empowered to enter into this Agreement.  
7 Hereinafter, the Navy and the SFRA are each sometimes referred to individually as a "Party"  
8 and collectively as the "Parties."

9  
10                                   **GENERAL PROVISIONS**

11  
12       The Federal Government, for and on behalf of the citizens of the United States of  
13 America, acts as the steward of certain real property on which it operates and maintains  
14 military facilities necessary for the defense of the United States of America. Certain military  
15 facilities are no longer required for that mission, and, in accordance with various base closure  
16 statutory authorities, the Department of Defense ("DOD") closed and plans to dispose of real  
17 and personal property at those facilities. The Navy is authorized to dispose of real and personal  
18 property on Hunters Point Naval Shipyard ("HPNS"), to the City of San Francisco or to a local  
19 reuse organization approved by the City, in accordance with Section 2824 (a) of the National  
20 Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510), as amended by Section  
21 2834 of the National Defense Authorization Action Act for Fiscal Year 1994 (Public Law 103-  
22 160). The SFRA is a local reuse organization approved by the City of San Francisco to accept  
23 conveyance of HPNS property in accordance with the authorities set out above.

24  
25       The Parties did execute and enter into that certain *Conveyance Agreement Between the*  
26 *United States of America, Acting by and through the Secretary of the Navy, and the San*  
27 *Francisco Redevelopment Agency for the Conveyance of Hunters Point Naval Shipyard*, dated  
28 March 31, 2004 ("Conveyance Agreement").

29  
30       Under the Comprehensive Environmental Response, Compensation and Liability Act  
31 ("CERCLA"), 42 U.S.C. Section 9620(h)(3)(C), Federal property may be transferred prior to the

## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

1 completion of all remedial action necessary to protect human health and the environment  
2 provided that the property is suitable for transfer for the intended uses and the intended use is  
3 consistent with the protection of human health and the environment. Under this early transfer  
4 authority, the Navy intends to convey title to the portion of HPNS property known as the Area  
5 Covered by Environmental Services (hereinafter "ACES"), to the SFRA. The ACES is defined  
6 in Section 222 below and shown in Appendix 2. The SFRA assumes responsibility for  
7 certain environmental response activities (hereinafter the "Environmental Services," as  
8 defined in Section 211 below) for the consideration set forth in this Agreement. In accordance  
9 with 42 U.S.C. 9620(h)(3)(C)(iii), after all response action necessary to protect human health and  
10 the environment with respect to any hazardous substances remaining on the ACES on the date of  
11 transfer has been taken, the Navy will deliver to the SFRA an appropriate document containing  
12 the CERCLA warranty that all response action necessary to protect human health and the  
13 environment with respect to any substance remaining on the property on the date of transfer has  
14 been taken.

### **Article I SCOPE AND PURPOSE**

#### **Section 101. Scope and Purpose of Agreement**

15  
16  
17  
18  
19  
20  
21  
22 The principal purpose of this Agreement is to facilitate early transfer and redevelopment  
23 by providing the vehicle under which the SFRA will perform the Environmental Services in the  
24 ACES in order to satisfy the covenant requirements of the "early transfer" provisions of Section  
25 120(h)(3)(C)(iii) of CERCLA for the consideration specified herein. This Agreement is  
26 considered a Cooperative Agreement within the meaning of 31 U.S.C. Section 6305 and 10  
27 U.S.C. Section 2701(d)(1) and benefits both the Navy and the SFRA because it facilitates SFRA  
28 access to and control of the ACES in conjunction with implementation of the SFRA's Reuse  
29 Plan (as defined in Section 220 below) and immediate reuse by allowing the SFRA to  
30 cause to be performed certain environmental remediation activities while simultaneously  
31 facilitating redevelopment as defined herein. In addition, early transfer will allow the Navy to  
32 convey title in compliance with CERCLA requirements at an earlier date than could otherwise  
33 be achieved.

34  
35 The Navy is conveying HPNS Parcel B, with the exception of IR Sites 7 and 18 and the  
36 radiologically-impacted area around Building 140, and HPNS Parcel G as shown in Appendix  
37 \_\_, to the SFRA pursuant to the Navy's early transfer authority. The Navy and the United States  
38 Environmental Protection Agency ("EPA") have issued Records of Decision ("RODs", see  
39 Section 207) for HPNS Parcels B and G selecting remedial actions for responding to releases of  
40 CERCLA hazardous substances as provided by the Federal Facility Agreement ("FFA") entered  
41 into by the Navy and the Environmental Regulatory Agencies (as defined in Section 229 below)  
42 in 1991. The Navy is legally responsible for executing the remedial actions selected in those  
43 RODs as required by CERCLA, the National Oil and Hazardous Substances Contingency Plan



## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

1 (“NCP”), and the FFA. It is anticipated that the completion of remedial action required by the  
2 RODs will satisfy the covenant requirements of Section 120(h)(3)(C)(iii) of CERCLA.

3  
4 Subject to the provisions of this Agreement, the Navy and SFRA hereby agree that SFRA  
5 shall assume the Navy’s responsibility for and shall cause to be performed the Environmental  
6 Services (defined below in Section 211) subject to the receipt of funding from the Navy in an  
7 amount not to exceed the maximum funding obligation of \_\_\_\_\_ .  
8

9 The Navy and the Environmental Regulatory Agencies have entered into an FFA  
10 Amendment suspending the Navy’s FFA obligations to implement remedial actions required by  
11 the RODs and applicable Remedial Design reports. The SFRA has agreed with the  
12 Environmental Regulatory Agencies to conduct these remedial actions pursuant to an  
13 Administrative Order on Consent (“AOC”, see Section 201) entered into with the Environmental  
14 Regulatory Agencies. The FFA Amendment provides that the Navy will resume CERCLA  
15 responsibility for compliance with the FFA in the event of a Finding of Default as provided in  
16 the AOC or upon a termination of this Agreement pursuant to Sections 701 and 1003  
17 below.  
18

19 Nothing in this Agreement shall be construed as creating a legal obligation (contractual  
20 or otherwise) for either the Navy or SFRA to fund or perform remediation addressing either  
21 Navy Retained Conditions or (“NRCs, see Section 206), Special Exclusions (Section 239), or  
22 Ineligible Work (Section 218), nor shall this Agreement be construed to limit or otherwise effect  
23 any legal obligations of either the Navy or SFRA apart from this Agreement, except as  
24 specifically provided herein. No funds provided under Section 302(a) may be used by the SFRA  
25 to fund or perform either NRCs, Special Exclusions or Ineligible Work. If the SFRA remediates  
26 an NRC or Special Exclusion or performs Ineligible Work either voluntarily or pursuant to the  
27 AOC or other enforcement order, the SFRA agrees that it will do so at its own cost and expense,  
28 subject to the provisions of Article III and Section 711.  
29

30 Notwithstanding any other provisions of this Agreement, the Navy is not a party to,  
31 bound by, or responsible for compliance with any of the provisions of the AOC including  
32 AOC provisions concerning NRCs or Special Exclusions. Nothing in this Agreement shall  
33 be construed as creating a Navy legal obligation to SFRA under this Agreement (contractual  
34 or otherwise) for the Navy to comply with either AOC or Amended FFA provisions  
35 regarding NRCs or Special Exclusions.  
36

### **A r t i c l e   I I** **DEFINITIONS**

#### **Section 201. Agreement**

41 The term "Agreement" means this Early Transfer Cooperative Agreement.  
42  
43

## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

### **Section 203. San Francisco Redevelopment Agency**

The term San Francisco Redevelopment Agency or "SFRA" is the Redevelopment Authority of the State of California, recognized as the local redevelopment authority for the HPNS by the OEA on behalf of the Secretary of Defense. The SFRA is an entity that is within the meaning of the term "local government agency" as such term is used in 10 USC Section 2701(d)(1), with which the Navy is entitled to enter into "agreements on a reimbursable or other basis."

### **Section 204. Hunters Point Naval Shipyard**

The term "Hunters Point Naval Shipyard" or "HPNS" means that portion of the real property at the former Hunters Point Naval Shipyard, shown on the map attached as Appendix 1 and incorporated herein by reference.

### **Section 205. Administrative Order on Consent**

The term "Administrative Order on Consent" or "AOC" means that certain signed agreement executed between the SFRA, HPS Development Co., LP, and the Environmental Regulatory Agencies dated XX- XX-XXXX.

### **Section 206. Navy-Retained Conditions**

The term "Navy Retained Conditions" means Unexploded Ordnance (as defined in ETCA Section 223); Military Munitions (ETCA Section 224); chemical, radiological, or biological warfare agents; and Radiological Materials (ETCA Section 215). The term Navy Retained Conditions does not include Ineligible Work as defined in Section 218 of the ETCA.

### **Section 207. CERCLA Records of Decision**

The term "CERCLA Records of Decision" or "CERCLA RODs" means the CERCLA Record of Decision for Parcel B dated January 14, 2009, and the CERCLA Record of Decision for Parcel G dated February 18, 2009.

### **Section 208. Regulatory Closure**

The term "Regulatory Closure" means Environmental Regulatory Agency approval, by issuance of one or more Certificates of Completion for CERCLA response actions that collectively address the entire ACES (or encompassing the portion of the ACES or particular condition with respect to which the term is used) pursuant to the procedures set forth in the AOC and, to the extent the Environmental Services includes activities not covered by the AOC, such as an Unknown Condition Discovered Outside the Course of Remediation involving a petroleum

## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

release, written Environmental Regulatory Agency approval that no further action is required for that condition.

### **Section 209. Navy and Government**

The terms "Navy" and "Government" are used interchangeably herein.

### **Section 210. Long-Term Obligations**

The term "Long-Term Obligations" means any requirement of a ROD, RD Report, CERCLA, the NCP, or the AOC that extends beyond Regulatory Closure including but not limited to long-term review, monitoring, reporting and institutional control ("IC") and operation and maintenance requirements that are required to be performed after a Certificate of Completion has been issued pursuant to the AOC including but not limited to requirements to maintain Regulatory Closure and requirements associated with or in furtherance of the CERCLA RODs, RD Reports, and Operation and Maintenance reports reviewed and approved pursuant to the FFA, and including providing existing records and reports for the Navy's preparation of the CERCLA five year reviews for years 2013 and 2018 and SFRA preparation of the CERCLA five-year reviews thereafter. Long-Term Obligations do not include obligations attributable to NRCs or Special Exclusions.

### **Section 211. Environmental Services**

The term "Environmental Services" means performance of the activities necessary to achieve Regulatory Closure and comply with Long-Term Obligations as provided in the TSRS, including but not limited to those required to comply with the RODs and associated Remedial Design reports, CERCLA, and the NCP, with respect to (i) Known Conditions and Unknown Conditions Discovered During the Course of Remediation even if the funds provided under this Agreement, and any insurance proceeds from the Environmental Insurance Policies, have been exhausted and even if the term of the Environmental Insurance Policies has expired; and (ii) Unknown Conditions Discovered Outside the Course of Remediation, but only to the extent such activities are funded by the Environmental Insurance Policies or to the extent such funding is unavailable as a result of the failure of SFRA or a named insured (other than the Navy) to comply with the requirements of the Environmental Insurance Policies.

The term "Environmental Services" does not include, except as specifically provided herein, the performance of any activities related to the following: Navy Retained Conditions; Ineligible Work; or Special Exclusions.

### **Section 215. Radiological Materials *[Need to discuss further]***

The term "Radiological Materials" means solid, liquid, or gaseous material derived

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

from U.S. Government activities, that contains radionuclides regulated by the Atomic Energy Act of 1954, as amended, and those materials containing radionuclides defined as being derived from the Navy's work on the following: nuclear propulsion plants for ships and submarines; nuclear devices and nuclear components thereof, and; radiographic and instrument calibration sources and various instrumentation and radioluminescent products manufactured for military applications. The term "Radiological Materials" does not include products commonly used in non-military applications such as radioluminescent signs, and household smoke detector components that do not require special handling or special treatment as a result of the materials containing radionuclides and are handled as household hazardous waste..

### Section 216. Environmental Insurance Policies

The term "Environmental Insurance Policies" means the bindable environmental insurance policies substantially in the form shown in Appendix 4, which the SFRA will procure in accordance with the requirements as set forth below in Section 712.e.

### Section 218. Ineligible Work

The term "Ineligible Work" means the performance of any or more of the following work:

a. Cleanup of: (1) lead based paint ("LBP") and asbestos containing materials ("ACM") incorporated into building materials in their original location and not previously demolished by the Navy or its contractors or (2) lead in soil resulting from natural weathering LBP from buildings and structures.

b. Cleanup of pesticides and herbicides applied in accordance with the requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and its predecessors including, but not limited to, chlordane properly applied as a termiticide to presently existing wooden structures, their foundations, and underlying soils.

c. Additional remediation necessary to implement a change in land use from the land uses set forth in the 1997 Reuse Plan.

d. Management and disposal of construction and demolition debris except to the extent such debris is generated in the course of conducting the Environmental Services, such as the demolition of hardscape necessary to install a monitoring well.

e. Clean up of contaminants within existing buildings and structures, that have not been released into the environment; except for removal of liquids, solids, gases, sediments, and/or sludges from and including oil/water separators and other equipment and containment vessels within or beneath structures to the extent the equipment and vessels could not have been reasonably discovered by visual inspection during a pre-conveyance walk-through in which both parties participated.

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

f. Any activity, including management and offsite disposal of excavated contaminated soil or solid waste, associated with disturbing or altering a cover, cap or other component of an environmental remedy installed pursuant to the AOC, except to the extent such disturbance or alternation is necessary to comply with the AOC to address an environmental condition other than a condition that the disturbed or altered remedy component was designed to address.

g. Non-cleanup environmental compliance activities relating to redevelopment/construction following conveyance (e.g., compliance with air quality permit requirements for control of fugitive dust emissions that are not contaminated with hazardous substances or petroleum and the National Pollutant Discharge Elimination System ("NPDES") stormwater discharge permit requirements regulating excavation/disturbance of soil that is not contaminated with hazardous substances or petroleum).

h. Any other work or activity that is not related to the performance of the Environmental Services.

i. All Regulatory Enforcement Activities.

j. Cleanup that is required as a result of a violation of: (i) use restrictions by the SFRA, its successors and assigns, or (ii) any land use restriction, groundwater restriction, deed covenant or IC applicable to the ACES.

k. Cleanup arising from the failure of the SFRA, its successors and assigns, to operate or maintain a remedy as required by the PCAP or USEPA through the CERCLA RODs, AOC, Land Use Control Remedial Design Reports ("LUC RD"), Risk Management Plan ("RMP") and/or Operation and Maintenance Plan ("OMP").

### Section 220. Reuse Plan

The term "Reuse Plan" means that certain Redevelopment Plan for the HPNS, approved by the Mayor and Board of Supervisors for the City of San Francisco in July of 1997, as such Redevelopment Plan has been amended as of the date of the execution of this Agreement by the following documents: (i) XXXX and (ii) XXXX, all in accordance with the California Community Redevelopment Law (Health and Safety Code Section 33000, et seq.).

### Section 221. (Reserved)

### Section 222. Area Covered by Environmental Services

The term "Area Covered by Environmental Services" or "ACES" means that area identified on the map in Appendix 2, and specifically excludes IR Sites 7/18 and the

## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

radiologically-impacted area around Building 140.

### **Section 223. \_Unexploded Ordnance/Munitions or Explosives of Concern**

The term "Unexploded Ordnance" or "UXO" means Military Munitions that have been fired, dropped, launched, projected, or otherwise placed, abandoned or disposed of in such manner as to constitute a hazard to military or non-military operations, installations, personnel, or material and remain unexploded either by malfunction, design, or any other cause.

### **Section 224. Military Munitions**

The term "Military Munitions" means all ammunition products and components produced or used by or for DOD or the United States Armed Services for national defense and security, including military munitions under the control of DOD, the United States Coast Guard, the United States Department of Energy ("DOE") and National Guard personnel. The term "Military Munitions" includes but is not limited to confined gaseous, liquid, and solid propellants, explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries used by DOD components, including bulk explosives and chemical warfare agents, chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, demolition charges, and devices and components thereof. The term "Military Munitions" does not include wholly inert items and non-standard explosive devices made from either military or non-military materials by personnel unrelated to DOD. However, the term "Military Munitions" does include non-nuclear components of nuclear devices managed under DOE's nuclear weapons program after all required sanitization operations under the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§2011 et seq., have been completed.

### **Section 225. Technical Specifications and Requirement Statement**

The term "Technical Specifications and Requirement Statement" or "TSRS" means the statement of work included in Appendix 9.

### **Section 226. Regulatory Oversight**

The term "Regulatory Oversight" includes all activities performed by EPA, DTSC, and RWQCB necessary to oversee the implementation of the AOC at the same level of service as would have been provided to the Navy, other than Regulatory Enforcement Activities.

### **Section 227. Regulatory Enforcement Activities**

The term "Regulatory Enforcement Activities" means any regulatory enforcement costs that are not allowable costs under 10 U.S.C. 2701(d)(3), including

## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

activities associated with EPA, DTSC, RWQCB, or other independent State or Federal regulatory agency with jurisdiction over the ACES taking enforcement actions against the SFRA, or its contractors or agents, for alleged violations of laws, regulations, or enforceable agreements associated with environmental protection, public health or safety.

### **Section 228. Navy Grants Officer**

The term "Navy Grants Officer" means the Director of Acquisition, NAVFACENGCOM.

### **Section 229. Environmental Regulatory Agency or Agencies**

The term "Environmental Regulatory Agency or Agencies" means the United States Environmental Protection Agency ("USEPA"), the California Department of Toxic Substances Control ("DTSC"), and the San Francisco Bay Water Quality Control Board ("RWQCB").

### **Section 230. Covenant to Restrict the Use of Property**

The term "Covenant to Restrict the Use of Property" or "CRUP" means that certain document required by the CERCLA RODs that identifies the environmental covenants and restrictions that shall apply to the ACES.

### **Section 231. Amended Federal Facilities Agreement**

The term "Amended Federal Facilities Agreement" or "Amended FFA" means that certain document executed by the Navy, USEPA, DTSC, and RWQCB dated \_\_\_\_\_, whereby the parties to the original Federal Facilities Agreement for the HPNS dated January 22, 1992 ("FFA"), amended such FFA.

**Section 232.** \_[Reserved – PCAP definition, and references in operative language to be reinserted if PCAP work is not completed by Navy before execution.]

### **Section 233. Remedial Action Closeout Report**

The term "Remedial Action Closeout Report" or "RACR" means (Insert exact definition from AOC).

### **Section 234. Certificate of Completion**

The term "Certificate of Completion" means (Insert exact definition from AOC).

### **Section 235. Environmental Conditions**

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

The term “Environmental Condition(s)” means a discharge, release, or threatened discharge or release into the environment of a hazardous substance, waste, oil, or petroleum product within the scope of any of the following:

- a. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9601 et seq.;
- b. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901 et seq.;
- c. California Hazardous Waste Control Act (California Health and Safety Code Sections §25100 et seq.);
- d. California Hazardous Substances Account Act (California Health and Safety Code Sections §25300 et seq.);
- e. Porter-Cologne Water Quality Control Act (California Water Code §13000 et seq.);
- f. Or similar federal or state environmental law.

### Section 236. Known Condition(s)

The term “Known Condition” means one or more specified chemicals of concern in a specified medium (e.g., soil or groundwater) identified in the CERCLA RODs as requiring remedial action .

### Section 237. Navy Remedy Failure

The term “Navy Remedy Failure” means any circumstance, not due to negligence by SFRA, where a remedy selected in the CERCLA RODs or subsequent CERCLA decision document issued by the Navy has been implemented by SFRA in accordance with the RODs and approved remedial design documents but is determined by EPA not to have achieved the ROD’s remedial action objectives. “Navy Remedy Failure” does not include volatile organic compound (VOC) vapor migration and accumulation caused by redevelopment activities.

### Section 239. Special Exclusions.

The term “Special Exclusions” means any of the following:

- a. Activities and associated costs necessary to conduct any additional remedial action required by an Amendment to, or Explanation of Significance Difference (ESD) from, the Parcels B and G CERCLA RODs, except to the extent such activities and associated costs are funded by the Environmental Insurance Policies, or except to the extent attributable to any of the following:

1. The negligence of the SFRA or any party acting on its behalf, or any failure to perform Long-Term Obligations;



## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

2. Requests by the SFRA or other party acting on behalf of the SFRA for modification of a remedial action selected in the Parcels B and G CERCLA RODs that is not required as a result of a Navy Remedy Failure, or from the discovery of a Navy Retained Condition or one of the other Special Exclusions identified in subparagraphs b through f of this Section;

b. Activities and associated costs necessary to address any Environmental Condition migrating onto Parcel B from IR Site 25 in Parcel C or an Environmental Condition migrating onto Parcel G from Building 406 (also known as the IR Site 36 groundwater contamination/treatment area) in Parcel E.

c. Activities and associated costs, other than those required to implement the portions of the CERCLA RODs requiring the rebuilding of portions of the revetment wall on the Parcel B shoreline, necessary to address any Environmental Condition that has migrated onto Parcel F from Parcel B, except to the extent attributable to any negligence of the SFRA or any party acting on its behalf.

d. The performance of CERCLA five-year reviews for years 2013 and 2018 for remedies selected in the CERCLA RODs issued by the Navy.

e. Any activity and associated cost related to an Unknown Condition Discovered Outside the Course of Remediation that is not funded by the Environmental Insurance Policies, provided the unavailability of insurance funds is not the result of the failure of SFRA or a named insured (other than the Navy) to comply with the requirements of the Environmental Insurance Policies.

f. *(Place holder for any additional exclusions in the insurance policies mutually agreed by Navy and SFRA).*

### **Section 240. Unknown Conditions Discovered During the Course of Remediation**

The term “Unknown Conditions Discovered During the Course of Remediation” means Environmental Conditions that are discovered in the course of implementing the requirements of the CERCLA RODs or the AOC in a portion of the ACES that has not achieved Regulatory Closure, and are not Known Conditions, Special Exclusions, or Navy Retained Conditions. Discovered in the course of implementing the requirements of the CERCLA RODs or the AOC shall include environmental conditions discovered during the cut and fill site preparation activities prior to installation of the initial remedial cover and environmental conditions discovered by disturbing or altering a cover, cap or other component of an environmental remedy as defined in Section 218 (f).

### **Section 241. Unknown Conditions Discovered Outside the Course of Remediation**

# **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

The term "Unknown Conditions Discovered Outside the Course of Remediation" means Environmental Conditions other than Known Conditions and Unknown Conditions Discovered During the Course of Remediation.

## **A r t i c l e   I I I OBLIGATIONS OF THE PARTIES**

### **Section 301. Obligations of the SFRA**

In consideration of the Navy's agreement to pay the SFRA for allowable costs in the amount specified in Section 302 below, the terms of this Agreement, the provisions of Title 32 of the Code of Federal Regulations ("CFRs"), and the applicable Office of Management and Budget ("OMB") Circulars, the SFRA agrees that it shall perform or cause to be performed the Environmental Services.

a. The SFRA shall complete the Environmental Services consistent with the TSRS and in compliance with the RODs, RD Reports, CERCLA and the NCP. If the SFRA transfers a portion of the ACES to another party, SFRA shall remain responsible for performing the Environmental Services on that portion. The SFRA shall ensure that the initial cap/covers required by the CERCLA RODs shall be installed throughout the ACES before transferring its final property interest within the ACES to a third party or no later than seven (7) years after the date of execution of this Agreement by both parties, whichever shall occur first.

b. The SFRA's obligation to perform Environmental Services is expressly conditioned upon the Navy providing funding for performing the Environmental Services in accordance with Section 302 hereof. However, to the extent that the Navy pays a portion of the funding set forth in Section 302 hereof, but fails to pay the full amount set forth in that Section, or in the event that the Agreement terminates pursuant to Section 1003 hereof, the SFRA's obligations shall be limited to only that portion of Environmental Services which have been performed by use of the funds actually provided by the Navy or the insurer as set forth in Section 712.b hereof. Any dispute with respect to delineating the portion of the Environmental Services performed with the use of such partial funding shall be subject to dispute resolution pursuant to Section 1001 hereof. The SFRA shall make reasonable progress toward performing Environmental Services.

c. In the event this Agreement terminates pursuant to Section 1003 below, the SFRA shall return or cause to be returned to the Navy any funds held by the SFRA or independent third party payee not otherwise committed for allowable costs of payment for Environmental Services performed in accordance with this Agreement.

d. The SFRA shall cause the performance of the Environmental Services in a manner that will not unreasonably delay any action that the Navy determines that it may

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

undertake in order to address NRCs or Special Exclusions.

e. The SFRA shall indemnify the Navy pursuant to the terms of Section 711. hereof.

f. The SFRA shall conduct audits and shall provide performance and financial reports to the Navy as follows:

(1) In accordance with the provisions contained in 32 CFR 33.26, the SFRA is responsible for obtaining annual audits in accordance with the Single Audit Act Amendments of 1996 (31 USC 7501-7507) and revised OMB Circular A133, "Audits of States, Local Governments, and Non-Profit Organizations." The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial audits. The costs of audits made in accordance with this section are allowable costs under this Agreement.

(2) The SFRA is responsible for assuring compliance with applicable Federal requirements and that performance goals are being achieved. In accordance with 32 CFR 33.40, the SFRA shall submit timely performance reports to the Navy. All reports shall be submitted to the Navy on the same schedule as the SFRA, its developer, or its contractors submit such information to the insurance provider.

(3) In accordance with 32 CFR 33.41, the SFRA shall submit timely financial status reports to the Navy. All reports shall be submitted to the Navy on the same schedule as the SFRA, its developer, or its contractors submit such information to the insurance provider.

g. In the event that the SFRA is served with a complaint or written notice by an Environmental Regulatory Agency, or other third parties, that suggests that an action is necessary related to an Environmental Condition at or affecting the ACES for which the SFRA asserts that it is not responsible, the SFRA shall provide the Navy Notice and a copy of all applicable documents as soon as possible but no later than seven (7) calendar days following such receipt.

h. The SFRA shall notify the Navy within thirty (30) calendar days of SFRA discovering, or receiving actual notice of, any Environmental Condition at or affecting the ACES for which the SFRA is not responsible. The exception to this duty is that the SFRA shall notify the Navy of the discovery of any UXO, biological warfare agents, or radiological or chemical warfare agents within twenty-four (24) hours of any such discovery. If the Navy responds to this notice by asserting that the Environmental Condition that is the subject of the notice provided under this paragraph 301(h) or paragraph 301(g) above is within the Scope of the Environmental Services, the Parties shall, within a reasonable time after such response, meet and confer to attempt to reach a mutually agreeable solution to address the circumstances,

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including, if appropriate agreeing to the scope of any initial investigation that may be necessary to ascertain whether the discovery is within the scope of Environmental Services. If the Parties cannot agree if the discovery is within the scope of Environmental Services, and a mutually agreeable solution to address the circumstances is not reached within a reasonable period of time after commencement of discussions between the SFRA and the Navy and, if applicable, the Environmental Regulatory Agencies, the Parties reserve the right to initiate the dispute resolution process as described in Section 1001 of this Agreement.

i. Notwithstanding the preceding Section 301(h) the SFRA shall have the right, but not the duty, to take or cause to be taken the following actions within the ACES with respect to an Environmental Condition that is not a Navy Retained Condition and that is not within the scope of the Environmental Services:

(1) **Investigation Activities.** Other than a condition subject to emergency action, if the SFRA discovers a condition it reasonably believes is an Environmental Condition that is not within the scope of the Environmental Services, the SFRA shall use its reasonable efforts to avoid incurring costs or obligations with respect to the Environmental Condition. If, despite using commercially reasonable efforts to avoid incurring such costs, the SFRA incurs costs or obligations with respect to the Environmental Condition, the SFRA may seek reimbursement from the Navy for the reasonable investigation costs, subject to the Navy's funding limitation as set forth in Section 401 and the dispute resolution provisions of Section 1001.

(2) **Emergency Actions.** The SFRA may take immediate action to address an imminent threat to human health or the environment. The SFRA may seek reimbursement from the Navy, subject to the Navy's funding limitation as set forth in Section 401 and the dispute resolution provisions of Section 1001, for the reasonable response costs related to such emergency action regarding a Navy Retained Condition where notification cannot practicably be provided to the Navy before such action needed to be taken OR notification is provided to the Navy before such action and the Navy agrees to permit the SFRA to take such emergency action under terms agreed to by the Parties.

(3) **Notice.** To the extent that the SFRA takes or causes to be taken actions in accordance with Section 301.i(1) and (2), the SFRA shall notify the Navy of such action as soon as practicable but no later than fifteen (15) business days after the SFRA takes or causes to be taken any such action. If the Navy disputes an SFRA action taken under Section 301.i(1) and (2), the Navy may initiate dispute resolution procedures under Section 1001.

j. The SFRA shall provide to the Navy all information obtained or developed by the SFRA with respect to any Environmental Condition that is not within the Scope of the Environmental Services and that the SFRA discovers.

k. The SFRA shall obtain the Environmental Insurance Policies, and other

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

insurance required, as described in Section 712, herein and substantially in the form shown in Appendix 4.

I. The SFRA shall conduct annual site inspections pursuant to the LUC RD and CERCLA RODs, AOC, CRUP, and deeds and shall assure preparation of any applicable compliance monitoring reports and certificates associated with environmental land use restrictions on the ACES. [NOTE: Subject to SFRA preparing a proposal for the scope and cost of IC monitoring and enforcement]

### Section 302. Obligations of the Navy

a. The maximum funding obligation of the Navy to the SFRA for performing the Environmental Services during the term of this Agreement is \$\_\_\_\_\_, which shall be paid in one advance payment or multiple payments of which the first payment shall be made within -- ( -- ) days after recordation of the deed conveying title to the Early Transfer Property from the Navy to the SFRA. The Navy's obligation to pay hereunder is subject to the availability of appropriated funds and this shall not be interpreted to require obligations or payments by the Navy in violation of the Anti-Deficiency Act (31 U.S.C. 1341).

b. Notwithstanding the provisions of Section 302.a. above, prior to payment being made to the SFRA, the terms, conditions and insurer, as required by Section 712 below, and as set forth in a final indication of the Environmental Insurance Policies, must be reviewed and approved by the Navy and the SFRA.

c. Within a reasonable time after the SFRA has provided the Navy with proper documentation establishing that Regulatory Closure has been obtained for the ACES, or portions of the ACES, as set forth in the AOC, and a written request from the SFRA to issue the appropriate CERCLA warranty for the ACES, or such portions of the ACES, the Navy shall issue to the SFRA the warranty required under CERCLA, Section 120(h)(3)(C)(iii). The SFRA shall bear the costs of preparing any new legal descriptions for the CERCLA warranty to be recorded.

d. The Navy shall comply with the procedures and terms set forth in Sections 301(h) and (i) with respect to discovery of Environmental Conditions that are not Navy Retained Conditions or Ineligible Work and that are not within the scope of the Environmental Services.

e. Any Navy liability for the death of or injury to any person, or the loss of or damage to any property, caused by Navy use of the ACES shall be determined in accordance with the applicable provisions of the Federal Tort Claims Act (28 U.S.C. Section 2671, et seq., as amended), or as otherwise provided by law.

## Article IV

# HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

## FUNDING LIMITATION AND BUDGETING

### Section 401. Navy's Funding Limitation

The maximum navy funding obligation for the Environmental Services to be performed by the SFRA under this Agreement is \$ \_\_\_\_\_. The Navy will not pay any Environmental Service costs that exceed the amount described in Section 302.a. above. The Navy's obligation to pay any costs hereunder is subject to the availability of appropriated funds. Nothing in this Agreement shall be interpreted to establish obligations or require payments by the Navy in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1341 et seq. The SFRA incurs any additional costs, including any costs for services or activities determined to be defined as Ineligible Work, at its own risk. Any statements in this Agreement regarding the SFRA's ability to seek reimbursement for any additional costs, or to negotiate any additional amounts to be paid, do not create a Navy obligation to pay such costs or amounts in excess of the Maximum Navy Funding Obligation.

Notwithstanding any other terms herein, this Agreement is not intended to mean and shall not be interpreted to obligate the Navy to pay any amount to the SFRA in excess of the Maximum Navy Funding Obligation or to perform any remedial, response or other environmental action. The obligation, if any, to perform such remedial, response, or other environmental action shall be governed solely by applicable law. However, nothing herein precludes the Parties from entering into agreements to address other Navy obligations or activities.

INSERT THE UIC AND LINE OF ACCOUNTING HERE

## Article V PAYMENT SCHEDULE

### Section 501. General

Subject to the Availability of funds, the SFRA shall be paid in accordance with Section 302(a) hereof.

### Section 502. Payments

a. The amount provided by the Navy is an advance payment or payments to be made to the SFRA. Such payment or payments shall, upon execution by all Parties to this Agreement, be deposited into an interest bearing escrow account pending transfer of the advance payment to the SFRA in accordance with the Escrow Instructions set forth in Appendix --. Payment to the SFRA shall be made in accordance with the advance payment requirements of 32 CFR §33.21(c), as follows:

## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

1  
2 (1) The SFRA shall maintain or demonstrate the willingness and ability to  
3 maintain procedures to minimize the time elapsing between the transfer of the funds from the  
4 escrow account to the SFRA and their disbursement by the SFRA to an independent third party  
5 payee.

6  
7 (2) Within a reasonable period of time after receiving the advance payment from  
8 the escrow account, the SFRA shall deposit the funds with an independent third party payee .  
9 Such independent third party payee shall be responsible for making all payments to a  
10 subsequent transferee and/or environmental contractor(s), with whom the SFRA enters into an  
11 agreement to perform the Environmental Services or to supervise the performance of the  
12 Environmental Services. Funds shall be considered disbursed by the SFRA when the following  
13 has occurred:

14  
15 (A). The SFRA does not retain possession of the funds;

16  
17 (B). The SFRA cannot get the funds back upon demand (this does not  
18 include allowable costs incurred by the SFRA for which the SFRA requests proper  
19 reimbursement from the independent third party payee);

20  
21 (C). The independent third party payee is an independent stakeholder  
22 from the SFRA and the party or parties with whom the SFRA enters into an agreement to  
23 perform the Environmental Services or supervise the performance of the Environmental Services  
24 and not the agent of the SFRA;

25  
26 (D). The SFRA receives something in exchange for the transfer of  
27 funds to the independent third party payee, such as a contractual promise to hold the funds and  
28 make payments in accordance with specified procedures.

29  
30 (3) Any agreement by the SFRA with an independent third party payee must also  
31 include the above provisions and satisfy the requirements of 32 CFR §33.21(c).

32  
33 (4) Interest. Any interest earned on the advance payment while in  
34 the escrow account pending transfer to the SFRA and any interest earned on the  
35 advance payment by the SFRA prior to the disbursement of those funds by the SFRA to  
36 the independent third party payee must be returned to the Navy in accordance with 32 CFR  
37 §33.21(h)(2)(i). However, any interest earned on those funds after disbursement from the  
38 SFRA to the independent third party payee in accordance with Section 502.a. (2)(A)-(D) are  
39 considered funds to be utilized for the purposes of this Agreement.

### **Article VI PAYMENT**

# **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

## **Section 601. RESERVED**

## **Section 602. Relation to Prompt Payment Act.**

This Agreement is not a contract as defined under OMB Circular A-125, which implements the Prompt Payment Act of 1982 (31 U.S.C. Section 3901, et seq.). Accordingly, the Navy is not liable to the SFRA for interest on any untimely payments under this Agreement.

## **Section 603. Direct Navy Payment of SFRA Obligations**

The Navy is not in privity with, and shall not directly pay any SFRA contractors, employees, vendors, or creditors for any costs incurred by the SFRA under this Agreement. The Navy assumes no liability for any of the SFRA's contractual obligations that may result from any SFRA performance of duties under this Agreement. The Navy assumes no liability hereunder for any SFRA contractual obligations to any third parties for any reason. The SFRA hereby agrees to defend and hold the Navy harmless from any such liabilities.

## **A r t i c l e   V I I** **GENERAL PROVISIONS**

## **Section 701. Term of Agreement**

Unless terminated under Section 1003 below, this Agreement shall remain in effect until Regulatory Closure within the ACES has been obtained. The requirements and provisions described in Subsections 701.a and 701.b below shall survive such termination, but only if the Agreement is not terminated as a result of the Navy's failure to provide the funds specified in Section 401 above:

a. SFRA requirements to perform applicable Long-Term Obligations.

b. The SFRA's and the Navy's obligations under Section 711 below (including the relevant provisions of Sections 101, 102, 301.A, 302, 703, 706, 707, and 801 cross-referenced in Section 711), and Section 715.

## **Section 702. Amendment of Agreement**

Only a written instrument signed by the parties hereto may amend this Agreement.

## **Section 703. Successors and Assigns**

All obligations and covenants made by the parties under this Agreement will bind and inure to the benefit of any successors and assigns of the respective parties, whether or not



## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

expressly assumed by such successors or assigns, and may not be assigned in whole or in part without the written consent of the other party.

### **Section 704. Entire Agreement**

This Agreement constitutes the entire Agreement between the parties. All prior discussions and understandings on this matter are superseded by this Agreement.

### **Section 705. Severability**

If any provision of this Agreement is held invalid, the remainder of the Agreement will continue in force and effect to the extent not inconsistent with such holding.

### **Section 706. Waiver of Breach**

No Party shall be deemed to have waived any material provision of this Agreement upon any event of breach by the other party, and no "course of conduct" shall be considered to be such a waiver, absent the waiver being documented in a mutually signed writing.

### **Section 707. Notices**

Any notice, transmittal, approval, or other official communication made under this Agreement will be in writing and will be delivered by hand, facsimile transmission, electronic mail, or by mail to the other party at the address or facsimile transmission telephone number set forth below, or at such other address as may be later designated:

#### **With Regard to the Navy:**

Director, Base Realignment and Closure Management Office  
Department of the Navy  
1455 Frazee Road, Suite 900  
San Diego, CA 92108

#### **With a copy to:**

## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

### **With Regard to the SFRA:**

San Francisco Redevelopment Agency  
One South Van Ness Avenue  
Fifth Floor  
San Francisco, CA 94103  
Attn: \_\_\_\_\_

### **With a copy to:**

Celena Chen, Senior Attorney  
San Francisco Redevelopment Agency  
One South Van Ness Avenue  
Fifth Floor  
San Francisco, CA 94103

### **With a copy to:**

Elaine Warren, Assistant City Attorney  
Office of City Attorney  
City of San Francisco City Hall  
Room 234  
1 Dr. Carlton B. Goodlett Place  
San Francisco, CA 94102-4682

### **With a copy to:**

George R. Schlossberg, Esq.  
Kutak Rock LLP  
1101 Connecticut Avenue, N.W.  
Washington, D.C. 20036

## **Section 708. Conflict of Interest**

The SFRA shall ensure that its employees are prohibited from using their positions for a purpose that is, or gives the appearance of being, motivated by a desire for private gain for themselves or others.

## **Section 709. Access to and Retention of Records**

The SFRA shall afford any authorized representative of the Navy, DOD, the Comptroller General, or other Federal Government agency access and the right to examine all SFRA records, books, papers, and documents related to the SFRA's performance under this

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

Agreement and any additional records, book papers and documents that are otherwise required to be retained under this Agreement or the AOC. This includes all such records in automated forms ("Records") that are within the SFRA's custody or control, and that relate to its performance under this Agreement. This right of access excludes any attorney-client communications, attorney work product, or any other legally privileged documents. The SFRA shall retain required records intact in their original form, if not the original documents, or in another form if the Navy approves. Such approval shall not be unreasonably withheld. SFRA record retention requirements shall extend for at least three (3) years following the completion or the termination of this Agreement. The SFRA shall allow the Navy access to the SFRA's records during normal business hours. The Navy will give the SFRA seventy-two (72) hours prior notice of its intention to examine the SFRA's records, unless the Navy reasonably determines that more immediate entry is required by special circumstances. Any such entry shall not give rise to any claim or cause of action against the Navy by the SFRA or any officer, agent, employee, or contractor thereof.

### Section 710. Change of Circumstances

Each Party will promptly notify the other Party of any legal impediment, change of circumstances, pending litigation, or any other event or condition that may adversely affect such Party's ability to perform this Agreement.

### Section 711. Liability and Indemnity, Waiver and Release

#### a. The SFRA's Obligations and Limited Waiver of Statutory Rights

(1) In consideration of the Navy's payment to the SFRA under Section 302 above, and the other applicable terms of this Agreement, the SFRA agrees that it shall, upon receipt of the payment of the grant award, indemnify and hold the Navy harmless for any of the following, provided, however the SFRA's indemnification obligations under this subparagraph (a)(1) shall in no event apply to NRCs or Special Exclusions except to the extent that the NRCs or Special Exclusions are adversely affected and aggravated by the negligent or wrongful actions of the SFRA, its contractors, or its successors in interest:

(A) any claims incurred in responding to Environmental Conditions in the ACES and which are within the scope of Environmental Services; or address otherwise any Ineligible Work performed by or on behalf of the SFRA;

(B) any claims for Regulatory Oversight Costs ;

(C) all claims for personal injury or property damage to the extent caused by the SFRA or its contractors in the course of performing the Environmental Services;

(D) all natural resource damage claims pursuant to 42 U.S.C. Section

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

1 9607(a)(4)(C) pertaining to releases of hazardous substances, but only to the extent that such  
2 damages were caused, or contributed to, by the negligent or wrongful actions of the SFRA, its  
3 contractors or its successors in interest;

4  
5 (E) all costs arising from the performance of the  
6 Environmental Services which SFRA performs or causes to be performed;

7  
8 (F) all costs of additional remediation required on or within the  
9 ACES as a result of a change in land use from that upon which the initial remedial action  
10 selection decision was based when Regulatory Closure was completed;

11  
12 (G) all costs associated with the correction of any failure of any Navy-  
13 selected remedy implemented by the SFRA, but only to the extent such costs are directly  
14 attributable to the poor workmanship or negligence of the SFRA or its contractors in the  
15 performance of said implementation;

16  
17 (H) all costs arising from the correction of any failure of any remedy  
18 both selected and implemented by the SFRA; and

19  
20 (I) all costs arising from or associated with claims addressed in the  
21 Waiver, Release and Covenant Not to Sue provisions set forth in Section 711.A(6) below.

22  
23 (2) With regard to the ACES, the Parties agree that the SFRA has provided  
24 financial assurances reasonably acceptable by the Navy to meet the requirements of 42 U.S.C.  
25 Section 9620(h)(3)(C)(ii).

26  
27 (3) Except as otherwise expressly provided by this Agreement, this  
28 Agreement shall not be construed to limit, expand or otherwise affect any right that the SFRA  
29 may have, in the absence of this Agreement, to take legal action to require the Navy to act with  
30 respect to NRCs or Special Exclusions, or to seek damages resulting from the  
31 Navy's performance or failure to perform any actions with respect to NRCs or Special  
32 Exclusions. Except as otherwise expressly provided by this Agreement, this Agreement shall  
33 also not be construed to limit, expand or otherwise affect any right that the Navy may have, in  
34 the absence of this Agreement, to take legal action against the SFRA.

35  
36 (4) Nothing in this Section creates rights of any kind in any person or entity  
37 other than the Navy and the SFRA.

38  
39 (5) The SFRA and the Navy agree that the Environmental Services to be  
40 caused to be performed by the SFRA in accordance with the terms of this Agreement does not  
41 include any work relating to, nor is the SFRA responsible for indemnification of the Navy for  
42 any work related to, NRCs or Special Exclusions except to the extent that the NRCs or Special  
43 Exclusions are adversely affected and aggravated by the negligent or wrongful actions of the

## HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT

SFRA, its contractors, or its successors in interest.

(6) Waivers, Releases, and Covenants Not to Sue. In consideration of the Navy's payment to the SFRA under Section 302 above, and the other applicable terms of this Agreement and as an administrative settlement of past, present, and future claims or causes of action ("claims"), the SFRA, upon receipt of payment, waives, releases, and covenants not to sue or otherwise pursue any cost, claim or liability against the Government relating to:

(A) Any cleanup, response or corrective action associated with or as a result of environmental conditions in the ACES and within the scope of Environmental Services;

(B) Any consequential damages related to development delays caused by the Navy's performance of, or failure to perform, investigation or remediation activities with respect to NRCs or Special Exclusions; and

(C) Any cost of redeveloping, reconstructing, altering, repairing, or replacing any "initial" cap/cover or containment remedial action constructed pursuant to a CERCLA ROD except to the extent such disturbance or alteration is necessary to comply with the AOC as a result of potential or actual remedy failure or as a result of addressing Environmental Conditions other than those addressed by the cover, cap, or other environmental remedy. In no event shall SFRA be entitled to payment for claims, costs or damages for work or costs incurred pursuant to this Agreement for which it has already been paid pursuant to the Agreement.

(D) Any personal injury or property damage to the extent that it did not occur prior to the date of execution of this agreement by both parties.

### Section 712. Liability and Insurance

a. The SFRA shall either self-insure, or carry and maintain general liability insurance, to afford protection with limits of liability in amounts not less than \$5,000,000.00 in the event of bodily injury or death to any number of persons in any one accident.

b. The SFRA will either self-insure or carry and maintain worker's compensation or similar insurance in the form and amounts required by law. If a worker's compensation or similar insurance policy is obtained, any such insurance policy will provide a waiver of subrogation of any claims against the Navy, its officers, agents, or employees. In no circumstances will the SFRA be entitled to assign to any third party rights of action that the SFRA may have against the Navy.

c. General Liability Policy Provisions: All general liability insurance which the

## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

SFRA carries or maintains, or causes to be carried or maintained, under this Section 712 will be in such form, for such amounts, for such periods of time and with such insurers as the Navy may reasonably approve. All policies issued for general liability insurance required by this Agreement will provide that no cancellation will be effective until at least thirty (30) days after the Navy receives written notice thereof. Any such policy shall also provide a waiver of subrogation of any claims against the Navy, and its officers, agents, or employees. In no circumstances will the SFRA be entitled to assign to a third party any rights of action which the SFRA may have against the Navy. The Navy acknowledges and accepts the SFRA's self-insurance coverage for general liability, worker's compensation, or for any similar coverage.

d. Delivery of Policies: The SFRA will provide the Navy with a certificate of insurance or statement of self insurance evidencing the insurance required for the SFRA. At least thirty (30) days before any such policy expires, the SFRA shall also deliver to the Navy a certificate of insurance evidencing each renewal policy covering the same risks.

e. Environmental Insurance Requirements. Prior to the conveyance of any portion of the ACES to SFRA, SFRA shall procure environmental insurance policies approved by the Navy, providing "cost cap" or "stop loss" coverage for cost overruns associated with implementing the work required by the CERCLA RODs and further providing pollution legal liability or similar coverage, to the extent available, for Environmental Conditions not addressed by the CERCLA RODs and for third party liability claims associated with Environmental Conditions.

f. In the event that the SFRA remediation contractor is found to be in a "default" condition and the SFRA moves to hire a replacement contractor, the SFRA shall consult with the Navy prior to initiating actions by the replacement contractor.

### **Section 713. Reports**

To assure that the Navy will receive from the SFRA the appropriate documentation necessary for the Navy to execute the CERCLA covenant, the Navy may request that the SFRA provide additional information concerning the environmental condition of the ACES reasonably necessary to enable the Navy to execute the CERCLA covenant. As soon as possible after any such request is made, if the SFRA can reasonably obtain and release such information, the SFRA shall provide the Navy access to any documents containing such requested information. In any event, the SFRA agrees to provide the Navy such access within ten (10) business days of the Navy's information request.

### **Section 714. Officials Not to Benefit**

The SFRA acknowledges that no member or delegate to the United States Congress, or Resident Commissioner, shall be permitted to share in any part of this Agreement, or receive any benefit that may arise therefrom.

## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

### **Section 715. Representations**

a. The Navy represents that:

(1) it is fully authorized to enter into this Agreement;

(2) the SFRA may rely on the data provided to the SFRA or its contractors by the Navy or the Navy's contractors for purposes of performing the Environmental Services and making any disclosures required under applicable law; and

(3) the information provided to the SFRA by the Navy hereunder fairly and accurately represents the Navy's actual knowledge of the nature and extent of contamination within the ACES.

b. The SFRA represents that:

(1) it is a local reuse organization approved by the City in accordance with Section 2824 (a) of the National Defense Authorization Act for Fiscal Year 1991 (Public Law 101-510), as amended, and is fully authorized to enter into this Agreement; and,

(2) it enters into this Agreement cognizant of the requirements and prohibitions set forth in the Anti-Deficiency Act, and,

(3) any provision of this Agreement that states or implies that the Navy will reimburse the SFRA for any costs incurred, or that the Navy will perform any actions with respect to NRCs or Special Exclusions, are wholly subject to the Anti-Deficiency Act.

### **Section 716. Excess Funds**

Funds, as provided for in Section 401 and Section 502 above, are only to be expended for the purposes for which they were provided for under the terms of this Agreement. In accordance with the procedures outlined in 32 CFR 33.50, any funds paid to the SFRA that remain unencumbered for allowable costs, after all regulatory approvals have been obtained and the CERCLA warranty has been issued by the Navy, are funds which may be determined to be excess by the Navy and not authorized to be retained by the SFRA and upon written demand by the Navy, the SFRA must immediately refund to the Navy those excess funds.

## **Article VIII APPLICABLE LAWS AND REGULATIONS**

### **Section 801. Applicable Law**

This Agreement is entered into incident to the implementation of a Federal program.

## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

Accordingly, as it may affect the rights, remedies, and obligations of the United States, this Agreement will be governed exclusively by, and be construed only in accordance with Federal law.

### **Section 802. Governing Regulations**

This Agreement shall be enforced and interpreted in accordance with the Federal laws and regulations, directives, circulars, or other guidance cited in this Agreement. This Agreement will be administered according to the following authorities: DoD Directive 3210.6; the Uniform Administrative Requirements for Grants and Cooperative Agreements; other applicable portions of Title 32 of the Code of Federal Regulations, and pertinent OMB Circulars. If the provisions of this Agreement conflict with any such authorities, those authorities will govern.

### **Section 803. Environmental Protection**

Each Party agrees that its performance under this Agreement shall comply with all applicable state, Federal and local environmental laws and regulations.

## **A r t i c l e   I X PROCUREMENT**

### **Section 901. SFRA Contracts**

The SFRA's acquisition of goods and services to perform this Agreement will comply with the instructions and procedures contained in 32 CFR Section 33.36(b)(1) through (12). The SFRA must not contract with any party that is debarred, suspended, or otherwise excluded from, or ineligible for, participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension," and applicable DOD regulations thereunder.

### **Section 902. Preference for Local Residents**

a. Preference is allowed in entering into contracts with private entities for services to be performed at a military installation that is affected by closure or alignment under a base closure law. The Secretary of Defense may give preference, consistent with Federal, State, and local laws and regulations, to entities that plan to hire, to the maximum extent practicable, residents of the vicinity of such military installation to perform such contracts. Contracts for which the preference may be given include contracts to carry out environmental restoration activities or construction work at such military installations. Any such preference may be given for a contract only if the services to be performed under the contract at the military installation concerned can be carried out in a manner that is consistent with all other actions at the installation that the Secretary is legally required to undertake.

b. Definition. In this section, the term "base closure law" means the following:



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(1) The provisions of title II of the Defense Authorization Amendments and Base Closure and Realignment Act (Public Law 100-526; 10 U.S.C. 2687 note).

(2) The Defense Base Closure and Realignment Act of 1990, as amended (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note).

c. Applicability - Any preference given under subsection (a) shall apply only to contracts entered into after the base closure law was enacted.

### **A r t i c l e   X**

#### **TERMINATION, ENFORCEMENT, CLAIM AND DISPUTE RESOLUTION**

##### **Section 1001. Dispute Resolution**

a. Except as otherwise provided in this Agreement, these dispute resolution provisions are the sole recourse of any Party with respect to disputes and the enforcement of any terms of this Agreement.

b. A dispute shall be considered to have arisen when one Party sends the other Party written notice of such dispute. Such written notice will include, to the extent available, all of the following information: the amount of monetary relief claimed or the nature of other relief requested; the basis for such relief, and; any documents or other evidence pertinent to the claim.

c. If a dispute arises under this Agreement, the Parties agree to attempt to resolve the dispute at the staff level. The Parties shall confer at the staff level within fifteen (15) days after a notice of dispute is received. Should staff-level discussions not resolve the dispute within such fifteen (15) day period (or longer, if agreed to by the Parties), the Parties agree to elevate the dispute to designated mid-level management. Mid-level management shall then attempt to resolve the dispute within thirty (30) days (or longer, if agreed to by the Parties) after receiving the dispute. If Mid-level management cannot timely resolve the dispute, the Parties agree to then raise the issue with their respective senior-level management. Senior -level management shall then attempt to resolve the dispute within thirty (30) days (or longer, if agreed to by the Parties) after receiving the dispute. Each Party shall have the discretion to determine the person(s) to represent it at any meeting convened under this section.

d. If the dispute cannot be resolved after exhausting the remedies under Section 1001c. above, the dispute shall be appealed to the Director of the Base Realignment and Closure Office at the address indicated in Section 707 above. Such appeal must be written, and contain all of the documentation and arguments necessary for a decision. The Director shall render a decision in a timely manner. If the SFRA disagrees with the Director's decision, the SFRA may, by providing notice to the other Party, pursue whatever remedies that the SFRA

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may have available at law or in equity.

e. To the extent that there is a conflict between the Dispute Resolution provisions or process set forth herein and any dispute resolution provisions or process contained in the Amended FFA, the dispute resolution provisions and process of the Amended FFA shall control.

### Section 1002. Enforcement

Either party may enforce this Agreement according to its terms. Without limiting either party's enforcement rights, in accordance with the terms of 32 CFR Section 33.43, Enforcement, for noncompliance of Grantee or subgrantee shall include:

a. Temporarily withholding cash payments pending correction of the deficiency by the SFRA or Sub-grantee or more severe enforcement action by the awarding agency;

b. Disallowing (denying both use of funds and matching credit for) all or part of the cost of the activity or action that is not in compliance;

c. Wholly or partly suspending or terminating the current award for the SFRA's or the Sub-grantee's program. Any award termination will be conducted under Section 1003 below.

d. Withholding further awards under this Agreement; and

e. Taking other remedies that may be legally available.

### Section 1003. Termination

a. This Agreement may terminate by its own terms under Section 701 above, or by a party under this Section 1003.

b. Reserved.

c. Reserved.

d. If a Party materially breaches this Agreement, the non-breaching party, to preserve its right to terminate, must provide the breaching party with a notice of intent to terminate. The breaching party shall have thirty (30) days to cure the breach, unless a longer period is agreed upon, in writing, by the parties. If the breaching party fails to cure the breach within the thirty (30) day (or longer, if agreed upon) period, then the non-breaching party may, in its discretion, terminate this Agreement no sooner than sixty (60) days after the cure period has expired. The existence of a material breach shall be finally determined under the dispute

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1 resolution procedures specified in Section 1001 above. Notwithstanding anything to the contrary  
2 in this Section 1003.d, the breaching party shall have ten (10) days to cure a breach that arises  
3 from any failure to make a required payment under this Agreement.

4  
5 e. If this Agreement is terminated for reasons other than those set forth in Section  
6 701 above, the SFRA shall immediately:

7  
8 (1) Stop work;

9  
10 (2) Place no further subcontracts or orders (referred to as subcontracts in this  
11 clause) for materials, services, or facilities;

12  
13 (3) Terminate all subcontracts;

14  
15 (4) With approval or ratification to the extent required by the Navy, settle all  
16 outstanding liabilities and termination settlement proposals arising from the termination of any  
17 subcontracts; any such approval or ratification will be final;

18  
19 (5) Take any action that may be necessary to protect human health or the  
20 environment against imminent and substantial endangerment thereto, or to protect and preserve  
21 any Navy-owned property at the ACES, as the Navy Grants Officer may direct; and

22  
23 (6) Return or cause to be returned to the Navy any funds held by the SFRA  
24 or the independent third party payee not otherwise committed for allowable costs  
25 of payment for Environmental Services performed in accordance with this Agreement.

26  
27 The SFRA agrees to insert such provisions in its contracts, and to require that such  
28 provisions be placed in any subsequent subcontracts between the SFRA's contractors and their  
29 subcontractors, so as to effect the provisions above.

30  
31 f. If this Agreement is terminated under this Section 1003, the status of the parties  
32 with respect to Environmental Conditions at the ACES shall revert to as the status that existed  
33 immediately preceding the effective date of this Agreement.

34  
35 g. A party's right to terminate, and any determination of funds available  
36 for reimbursement, under this Section 1003 shall be subject to the dispute resolution procedures  
37 in Section 1001 above.

### 38 39 **Section 1004.** Effects of Suspension and Termination

40  
41 a. Except for allowable costs in accordance with 32 CFR Section 33.22 and  
42 the applicable OMB Circulars, any costs to the SFRA resulting from obligations incurred by the  
43 SFRA during a suspension, or after termination of payments, are not allowable unless the Navy

## **HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE AGREEMENT**

expressly authorizes them in the notice of suspension or termination, or subsequently authorizes such costs. Any other SFRA costs incurred during suspension or after termination which are necessary and not reasonably avoidable are allowable only if:

(1) the costs result from obligations which were properly incurred by the SFRA before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, cannot be cancelled; and

(2) the costs would be allowable if the Agreement were not otherwise suspended or expired at the end of the funding period in which the termination takes effect.

b. The enforcement remedies specified in this section do not relieve the SFRA or its subcontractors from compliance with 32 CFR Section 33.35, Subpart C, or 32 CFR Part 25, including the restrictions on entering into a covered transaction with any party which is debarred, suspended, or is otherwise excluded from, or ineligible for participation in, Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

### **Article XI LEGAL AUTHORITY**

#### **Section 1101. Legal Authority**

The parties hereby represent and warrant that they are under no existing or reasonably foreseeable legal disabilities that would prevent or hinder them from fulfilling the terms and conditions of this Agreement. The parties will promptly notify each other of any legal impediment that arises during the term of this Agreement that may prevent or hinder the party's abilities to perform its duties under this Agreement.

**IN WITNESS WHEREOF**, and intending to be legally bound hereby, the parties to this Agreement, by their authorized representatives, hereby cause this Agreement to be executed.

#### **SAN FRANCISCO REDEVELOPMENT AGENCY**

By: \_\_\_\_\_

NAME:

TITLE: Director

Dated: \_\_\_\_\_

**HUNTERS POINT NAVAL SHIPYARD EARLY TRANSFER COOPERATIVE  
AGREEMENT**

**THE UNITED STATES OF AMERICA**

By: \_\_\_\_\_  
Mr. Robert Griffin  
Assistant Commander for Acquisition, Naval Facilities  
Engineering Command

Dated: \_\_\_\_\_